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IN THE

Supreme Court of the United States

October Term, 1970

No. 1380

MATHER CONSTRUCTION COMPANY,
D & L CONSTRUCTION COMPANY,
and
J. D. BRADLEY, INC.,
Petitioners,

v.

CONTINENTAL CASUALTY COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

CONTINENTAL CASUALTY COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on November 3, 1970.

OPINIONS BELOW

There was no formal opinion of the District Court. An excerpt of the transcript in that Court, including the judge's statement on granting summary judgment is reproduced in Appendix C to this Petition. The opinion of the Court of Appeals, which sustained the judgment of the District Court for the District of Columbia, is printed in Appendix A hereto and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on November 3, 1970. Timely Motion For Rehearing was filed and was denied on December 7, 1970. A Suggestion for a Rehearing *En Banc* was also filed on November 17, 1970, and to date no action has been forthcoming on that suggestion. This Court has jurisdiction under 28 U.S.C.A. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court below misconstrued, misinterpreted and misapplied Rule 56 of the Federal Rules of Civil Procedure, and has ignored the law of this Court and other Federal Courts in granting summary judgment in this case?

2. Whether the decision of the Court below is arbitrary and unreasonable and therefore presents a deprivation of property without due process of law?

3. Whether the exhibits relied upon to support the motion for summary judgment, not being properly authenticated, certified nor shown to be within the personal

knowledge of anyone competent to testify about them, satisfy the requirements of Rule 56(e), Federal Rules of Civil Procedure?

4. Whether testimony sought to be presented by affidavit where affiant is not subject to cross-examination on contested issues of fact, does not require greater strictures, rather than lesser, to be properly admissible?

5. Whether the Court below improperly ignored the two affidavits submitted by petitioners?

6. Whether a small, non-affluent businessman in challenging a corporate giant on contested issues of fact should be denied a jury trial on the merits?

CONSTITUTIONAL PROVISIONS, STATUTES RULES INVOLVED

The constitutional provisions involved are the due process clause of the fifth amendment to the United States Constitution and the right to a trial by jury in a civil suit clause of the seventh amendment to the United States Constitution. The statute giving the Supreme Court authority to prescribe general rules of civil procedure for the district courts is 28 U.S.C. Sec. 2072. The rules applicable in this case pertaining to summary judgment are Rules 56(c) and (e) of the Federal Rules of Civil Procedure. These provisions are printed in Appendix F hereto.

STATEMENT OF THE CASE

This is an action brought in the United States District Court for the District of Columbia by the respondent surety companies to claim petitioners' escrowed funds on deposit with the Escrow Deposit Agent. Jurisdiction was

under Title 11, District of Columbia Code, 1961 Edition, sections 305 and 306; 12 U.S.C. sec. 1702; 28 U.S.C. sec. 1352, as amended, and sections 2201 and 2202.

Petitioners are the contractors who built 220 Capehart housing units in three separately-identified projects, under separate leases and surveys, each described by metes and bounds; separate mortgages, mortgage notes and mortgage amortization schedules; releases; three separate sets of bonds, furnished by respondent sureties; and a separate financial closing with three separate and distinct Escrow Deposit Agreements covering two of the three completed projects.[1]

Respondents Continental Casualty Company and Fidelity and Casualty Company of New York, are the sureties who furnished the performance and payment bonds for each of the three projects. Respondent American Security Corporation is the Escrow Deposit Agent. Respondent Philip N. Brownstein was the Commissioner, Federal Housing Administration, whose agency provided the mortgage insurance for the projects. Respondents Mather AFB Housing No. Two, Inc., and Mather AFB Housing No. Three, Inc., are the corporations owning the leaseholds which were acquired by the U.S. Air Force as each of the projects was completed and accepted by the Government.

At the closings, with the completion of the construction and acceptance by the Government for two of the three projects, three separate Escrow Deposit Agreements were executed setting forth precise terms and conditions covering the contractors' funds placed in escrow at the

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[1] For an applicable discussion of such closings and projects, see: *Inland Empire Builders, Inc. et al. v. The United States*, 424 F.2d 1370, 1377 (Ct. Cl. 1970).

direction of the FHA and the Air Force. It is the precise terms and conditions of these Escrow Deposit Agreements which are in dispute. The sums involved originally totalled more than $197,000.00, which, because of advances made, was reduced to $122,413.00, exclusive of interest accruing since February and March 1960.

Respondent sureties brought suit in the U.S. District Court for the District of Columbia claiming the remainder of the escrowed funds. Petitioners opposed the action and filed their counterclaim and demanded trial by jury on the merits.

Respondent sureties moved for summary judgment against the petitioners only relying on separate agreements made with each of the remaining respondents.

Respondent sureties, as the plaintiffs in the District Court, submitted a number of exhibits in support of their motion for summary judgment, none of which was authenticated, certified nor sworn to as required by Rule 56 (e).[2]

On the day of the hearing, immediately prior to the case being called, petitioners' counsel was served in the court room with a copy of one affidavit by a corporate executive, purporting to support respondents' motion for summary judgment. Said affidavit does not meet the requirements of Rule 56(e).[3] Prior to the decision of the District Court, respondents submitted two affidavits raising disputed issues of material fact which question the correctness of the decision of the District Court.

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[2] Appendix F.

[3] *Ibid.*

REASONS FOR GRANTING THE WRIT

The decision of the Court below directly conflicts in principle with a recent decision of this Court, *Adickes v. S. H. Kress*, 398 U.S. 144 (1969), as well as a number of recent decisions of the Circuit Courts of Appeal for the Tenth,[4] Ninth,[5] Eighth,[6] Seventh,[7] Fifth,[8] Second,[9] and First[10] Circuits. Each of these recent decisions deals with substantive facets of the principles to be applied in determining whether (1) there has been a sufficient showing that there is no genuine issue as to any material fact, and (2) the supporting affidavits to sustain the granting of summary judgment.

The legal principles laid down by this Court in *Adickes*, other earlier decisions of this Court, as well as numerous recent decisions of Courts of Appeals in other Federal Circuits, are the principles petitioners contend should be accorded to them under Rule 56(c) and (e), Federal Rules of Civil Procedure, in granting them due process.

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[4] *Morgan v. Dillingham*, 424 F.2d 200; *Hanley v. Chrysler Motor*, 433 F.2d 708, (10th Cir. 1970).

[5] *Apple Valley Bldg. v. Bonanza*, 423 F.2d 661; *U.S. v. Dibble*, 429 F.2d 598; *U.S. v. Perry*, 431 F.2d 1020, (9th Cir. 1970).

[6] *City Nat'l. Bank v. Vanderboom*, 422 F.2d 221, (8th Cir. 1970).

[7] *Zahora v. Harnischfeger*, 404 F.2d 172; *Kirk v. Home Indemnity*, 431 F.2d 554, (7th Cir. 1968, 1970).

[8] *Keating v. Jones*, 398 F.2d 1011; *Jones v. Borden*, 430 F.2d 568; *Lovable v. Honeywell*, 431 F.2d 668, (5th Cir. 1968, 1970).

[9] *Lemelson v. Ideal Toy*, 408 F.2d 860; *Kletscha v. Driver*, 411 F.2d 436, (2d Cir. 1969).

[10] *Briggs v. Herrigan*, 431 F.2d 967, (1st Cir. 1970).

Petitioners maintain that due process is being denied them by the device of a legal maneuver which ignores their efforts to have their rights determined in a trial by jury. As the Court of Appeals held in *U.S. v. Dibble*, 429 F.2d 598, (9th Cir. 1970), "Summary judgment is neither method of avoiding necessity for proving one's case nor clever procedural gambit whereby claimant can shift to his adversary his burden of proof on one or more issues."

The District Court in the instant case (App. C) recognized that there were "extensive pleadings". This admitted fact, when considered with the affidavits of petitioners (App. G and H), and the affidavit of respondent, Continental Casualty Company, (App. I), places the decision of the District Court in direct conflict with the prevailing rule of this Court and a substantial number of decisions of other Circuit Courts of Appeals.

A further direct conflict with the *Dibble* case, *supra*, is the lack of authentication of the documents submitted by respondents as required by Rule 56 (e), Rules of Civil Procedure. While the decision of the Court below states at Page 2 of App. A as follows: "* * * This included as exhibits photostats of some thirty-five cancelled checks, * * *", the Court below misapprehended the fact that none of these "thirty-five cancelled checks" was admissible in evidence since none was authenticated, sworn or certified nor were they referred to in an affidavit attached thereto or served therewith.[11] Further in the instant case, the Court below overlooked the fact that a significant number of these *cancelled checks* included the fact that they were in payment for projects other than the one project for which these funds were escrowed. It is issues of this kind where a "trial, with its opportunity for cross-examination and testing credibility of

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[11] Rule 56(e), Rules of Civil Procedure, App. F.

witnesses, might disclose picture substantially different from that given by affidavit."[12] It is this inability to cross-examine respondents' witness in testifying by affidavit, as to the precise content of these *exhibits* and to establish that claims allegedly paid by respondents did not include work and materials for projects *other* than that for which petitioners' funds were escrowed, that is in conflict with the prevailing law of this Court and other Circuit Courts of Appeal. At Pages 5 and 6 of App. A, the Court below extends to respondents an evidentiary advantage to which they are not entitled under Rule 56 (e), Rules of Civil Procedure, nor the law as enunciated by this Court and a substantial number of other Courts of Appeal. The "Statement of Material Facts as to Which There Is No Genuine Issue," quoted at Page 6, *supra,* was not sworn as required by Rule 56(e), nor is it accurate to say that: "This affirmation was not contradicted by appellants before the District Court."

This case is important to a vast number of small, unknown and non-affluent businessmen who are frustrated by the legal procedures of sophisticated and affluent corporate giants who seek to cloud the facts with collateral issues and extraneous matter which will not withstand the close scrutiny of a full trial on the merits.

The matter of affidavits in motions for summary judgment is vitally important to a great number of the average small-litigants who challenge economically-powerful adversaries in a forum where every man is entitled to his day in court.

While one of the original purposes of the use of summary judgments was to expedite and facilitate the orderly

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[12] *U.S. v. Perry*, 431 F.2d 1020, (9th Cir. 1970).

administration of justice,[13] it was not intended to frustrate and throttle the right of the small litigant where there are genuine issues of dispute to resolve. The legal maneuverings by parties seeking to avoid a full trial on the issues where legal proof is necessary; where witnesses must appear before the Court in person; or testify by deposition, where provision is made for cross-examination; involves more time, effort and expense than does a full trial on the merits. A trial by jury with full legal protection for all parties is not an impediment to justice nor a luxury to be avoided in complicated factual situations, but rather a right to due process guaranteed by the Constitution.

The decision of the District Court, with no reasons stated, and the action of the Court below, both in conflict with the provisions of the Rules of Civil Procedure and the prevailing law of this and other Federal Courts, leaves all future litigants in similar situations in a legal quandary as to their rights under the Constitution.

Because of *Adickes,* other decisions of this Court,[14] as well as a substantial number of recent decisions of other Circuit Courts of Appeals,[15] patently in conflict with the instant decision of the Court below, it is imperative that this decision be reviewed by this Court to establish uniformity and recognition of common principles applicable in all Circuits.

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[13] 6 Moore, Federal Practice 2d Ed. 56.02, and 56.04.

[14] *Sartor v. Arkansas Nat. Gas Corp.*, 321 U.S. 620, 627 (1944); *Associated Press v. U.S.*, 326 U.S. 1, 5, 6 (1945); *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); *U.S. v. Diebold*, 369 U.S. 654 (1962).

[15] See Footnotes 4 through 10, *supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,171

CONTINENTAL CASUALTY COMPANY, *ET AL.*

v.

AMERICAN SECURITY CORPORATION, *ET AL.*
MATHER CONSTRUCTION COMPANY, *ET AL.*, *Appellants*
MATHER AFB HOUSING NO. TWO, INC., *ET AL.*

Appeal from the United States District Court
for the District of Columbia

Decided November 3, 1970

Mr. Carl J. Felth, with whom *Mr. Daniel J. Anderson* was on the brief, for appellants. *Messrs. Thomas A. Flannery*, United States Attorney, *Joseph M. Hannon, John A. Terry* and *Miss Mary E. Folliard*, Assistant United States Attorneys, entered appearances for appellant Philip N. Brownstein, Commissioner, FHA. *Mr. Joel C. Wise* also entered an appearance for appellant American Security Corporation.

Mr. Kahl K. Spriggs, with whom *Mr. John F. Myers* was on the brief, for appellees.

Before MacKINNON and WILKEY, *Circuit Judges*, and CHRISTENSEN,* *U. S. District Judge*, District of Utah.

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* Sitting by designation pursuant to 28 U.S.C. §292 (c).

PER CURIAM: Continental Casualty Company and the Fidelity and Casualty Company of New York, appellees, brought this action against the construction contractors, appellants Mather Construction Company, D&L Construction Company, and J.D. Bradley, Inc., to recover amounts escrowed with the defendant American Security Corporation for unpaid bills for labor and materials and certain unfinished landscape items on the Mather Air Force Base project. Appellees were sureties on the performance and payment bonds given in relation to a contract for the construction of 220 units of military housing under the Capehart Act.[1]

The District Court granted summary judgment against the three appellant contracting companies, and found the appellees were entitled to the sums totalling $147,824.44 escrowed with the defendant American Security Corporation, the stakeholder who has not appealed. We affirm the summary judgment granted by the District Court.

Pursuant to Rule 56 and according to the usual practice, in support of their motion for summary judgment appellees filed a "Statement of Material Facts as to Which There Is No Genuine Issue."[2] This included as exhibits photostats of some thirty-five cancelled checks, representing the satisfaction of claims, of persons performing work as subcontractors or as suppliers furnishing materials, against the appellees as sureties for the three appellant contractors, as well as copies of the relevant contract and

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[1] 42 U.S.C. §§ 1594-1594f; 12 U.S.C. §§ 1748-1748g. For a description of the manner in which the Capehart Act scheme operates to accomplish its purpose of providing housing for military personnel without the use of appropriated funds, see *Anthony P. Miller v. United States*, 161 Ct. Cl. 455, 457 (1963).

[2] *See* Rule 9(h) of the Rules of the U.S. District Court for the District of Columbia.

indemnity agreements. An affidavit by an Assistant Vice President of the appellee Continental Casualty Company stated that the facts set forth in the affidavit were known personally to the affiant and were reflected in the office records of Continental Casualty Company to which the affiant had access in the course of his official duties, that the "Statement of Material Facts as to Which There Is No Genuine Issue" was true, and that all claims against the appellees as sureties were paid in good faith after investigation and in the belief that appellees were liable therefor. The itemized list of claims paid totalled $409,512.43.

The appellant construction firms did not file any affidavit contradicting the affidavit of the officer of the appellee surety company, nor did the appellants attempt to contradict under oath any single claim of payment, asserted under oath as having been made by the appellee surety companies. Appellants did file one affidavit, by D. L. Bradley, which dealt in general terms with the project and recited facts which were not in dispute by either party and therefore not material to any issue in the lawsuit, *e.g.*, that Mather AFB Housing No. Two, Inc., and Mather AFB Housing No. Three, Inc., projects were completed (with certain exceptions) and turned over to the Air Force. The important issue in the lawsuit was not about the substantial completion of the projects, but concerned unpaid materialmen and subcontractor bills left to be cleaned up by the surety companies and escrowed funds of undisbursed mortgage proceeds[3] which now are sought partially to reimburse the sureties.

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[3] Under the Capehart Act system the construction costs, including the builder's profit, are derived entirely from such mortgage proceeds. In the instant case, a portion of these funds were escrowed under three separate agreements to cover certain unpaid construction and landscaping costs. The appellee sureties, by virtue of their payment of claims against the bonds, claim to be subrogated to, and also, under the terms of their indemnity and assignment agreements, entitled to, whatever interest appellant contracting companies have in the escrowed funds.

Since the appellants had not put in issue by affidavits of their own a single material fact relied upon by the appellees in their motion for summary judgment, appellants' counsel stated at oral argument that the issue on appeal was the sufficiency of the appellees' affidavit to support the summary judgment granted by the District Court.

We find that the affidavit and the supporting documents were sufficient and formed a firm foundation for the action taken by the District Judge. This type of lawsuit, involving as it does numerous financial items, most of which are not in dispute and are susceptible of simple accounting treatment, is ideally suited for determination on summary judgment after appropriate interrogatories and other discovery processes have established that there is no genuine dispute as to any material fact.[4]

The affidavit here was by an officer of one of the appellee companies, charged with the responsibility for the processing of claims, who made affidavit on his own personal knowledge and on the records of his surety company with which his duties required him to be familiar.[5] All of these records would have been admissible at trial under the Federal Shop Book Rule,[6] and indeed their accuracy was in no

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[4] *See Atlantic States Construction Co. v. Robert E. Lee & Co., Inc. of South Carolina,* 406 F.2d 827, 829 (4th Cir. 1969); C. WRIGHT, FEDERAL COURTS §99 at 442 (1970).

[5] *Woods v. Allied Concord Financial Corp.,* 373 F.2d 733, 734 (5th Cir. 1967). *See Royal Indemnity Co. v. United States,* 178 Ct. Cl. 46, 371 F.2d 462 (1967).

[6] 28 U.S.C. § 1732.

way challenged by the appellants' cross-affidavit.[7] On the record before him the District Judge properly granted summary judgment.[8]

In oral argument appellants attempted to raise a question as to whether each and every dollar paid out by the surety companies was for a claim specifically related to one of the housing projects on Mather Air Force Base, and that the total claims paid on each of the projects was equal to or in excess of the amount in each escrow fund. In the posture of this case, appeal from a summary judgment, it suffices to point out that in support of their motion for

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[7] As we found to be the case in *Thompson v. Evening Star Newspaper Co.*, 129 U.S. App. D.C. 299, 302, 394 F.2d 774, 777 (1968) appellants "in effect, relied on [their] pleadings to create an issue of fact. That course is impermissible under F.R. Civ.P. 56(e)." Indeed, in the face of Rule 56(e)'s explicit direction that a party opposing summary judgment "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial," appellants' reply brief contains the following "comment" in summary of its argument that summary judgment was erroneously granted:

> Appellants submit that the sheer volume of the pleadings and the controversial matters in dispute involving a substantial sum of funds, escrowed by the appellants, prove conclusively that there are genuine issues of material fact to be resolved in a full trial before a jury on the merits.

Such a position is so plainly at odds with the requirements of rule 56 as to require no further comment.

[8] *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 (9th Cir. 1969); *Atlantic States Construction Co. v. Robert E. Lee & Co. Inc. of South Carolina*, 406 F.2d 827, 828-29 (4th Cir. 1969); *McGuire v. Columbia Broadcasting System*, 399 F.2d 902, 905 (9th Cir. 1968); *Fox v. Johnson & Wimsatt, Inc.*, 75 U.S. App. D.C. 211, 218-19, 127 F.2d 729, 736 (1942).

summary judgment appellees' "Statement of Material Facts as to Which There Is No Genuine Issue," whose contents were sworn to by an officer of one of the appellee companies, contained this language:

> Plaintiffs paid out, through the drafts above mentioned, to subcontractors and suppliers claiming and demanding unpaid amounts for work done and materials furnished in the prosecution of the aforesaid housing construction work on the Mather AFB Housing No. Two mortage area and on the Mather AFB Housing No. Three mortgage area *sums in excess of all amounts escrowed on each of such areas* with defendant American Security Corporation. (Emphasis added.)

This affirmation was not contradicted by appellants before the District Court.

Nor on the record before us do we see how it could have been contradicted. On 16 March 1960 William E. Fitzpatrick certified on behalf of appellants D & L Construction Company and J. D. Bradley, Inc., in relation to Mather AFB Housing No. Three, Inc., that there were outstanding liens totalling $97,728.44. On that same date there was in the Special Escrow Account for this project, dated 16 March 1960, the sum of $72,317.00. There was also in a second escrow fund, for incomplete work on the same Mather AFB Housing No. Three, Inc., the sum of $28,498.-00. There was in a third escrow fund, for incomplete work on Mather AFB Housing No. Two, Inc., the sum of $21,-598.00. The sureties asserted that they had paid off each and every one of the claims totalling $97,728.44, certified by the representative of two of the appellants, plus other claims on Mather AFB Housing No. Three, Inc., plus claims on Mather AFB Housing No. Two, Inc., all totalling $409,512.43. Such claims were sworn to have been "paid in good faith after investigation and in the belief that

plaintiffs were liable therefor, copies of the drafts for such payments being annexed." Appellees asserted under oath, and it appears highly likely, even if not absolutely certain, from the bare outline of facts we have given in this opinion, that the appellees did pay claims totalling in excess of all amounts escrowed on each of such areas, not only a grand total greatly in excess of the totalled escrowed amounts.

The appellants, as the contractors responsible for these projects, received the benefits of the payments made by the sureties. Under the established law of subrogation, appellees would be entitled to claim through appellants whatever rights the appellants had to these escrowed funds.[9] Appellants could not assert a right to these funds superior to that of the surety appellees, on the uncontradicted facts here. Furthermore, under the indemnity agreement and the assignments executed in regard to each project, the rights of the appellants in each and all of these escrow funds, whether derived from the same or a different project, were assigned to the appellee surety companies to the full amount of any and all sums paid by the sureties in the settlement of any claims arising under the bonds, if such claims were paid "in good faith under the belief that they or any of them were liable therefor, whether liable or not."[10] Moreover, as the appellees submitted in support of

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[9] *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962); *Morgenthau v. Fidelity & Deposit Co. of Maryland*, 68 App. D.C. 163, 94 F.2d 632 (1937); *Lyttle v. National Surety Co.*, 43 App. D.C. 136 (1915); *Fidelity & Deposit Co. of Maryland v. United States*, 183 Ct. Cl. 908, 393 F.2d 834 (1968); *The Home Indemnity Co. v. United States*, 180 Ct. Cl. 173, 376 F.2d 890 (1967); *United Pacific Insurance Co. v. United States*, 176 Ct. Cl. 176, 362 F.2d 805 (1966).

[10] A similar provision in an indemnity agreement has been upheld by the Supreme Court. *Martin v. National Surety Co.*, 300 U.S. 588 (1937). *See also Royal Indemnity Co. v. United States*, 117 Ct. Cl. 736, 93 F. Supp. 891 (1950).

their summary judgment motion, according to the provisions of the indemnity agreement, "an itemized statement thereof, sworn to by an officer of the sureties, or the voucher or vouchers, or other evidence of such payment . . . shall be prima facie evidence of the fact and extent of the liability of the applicants in any claim or suit hereunder and in any and all matters arising between the applicants and the sureties."[11]

Whether the theory of the sureties be reimbursement by subrogation or by the specific assignments in the indemnity agreements,[12] the appellees were entitled to the escrow funds held by American Security Corporation, and we cannot conceive of any theory by which on a trial on the merits appellants could possibly prevail.

The summary judgment of the District Court is hereby affirmed. An order of this court of 15 January 1970 enjoined the release of the escrow funds. Appellees have moved to vacate such order. Consistent with this opinion, such order is hereby vacated.

Affirmed.

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[11] The validity of a virtually identical provision was approved by this court in *Carroll v. National Surety Co.*, 58 App. D.C. 3, 24 F.2d 268 (1928). *See also Royal Indemnity Co. v. United States*, 178 Ct. Cl. 46, 371 F.2d 462 (1967).

[12] *Compare* the majority and concurring opinions in *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962).

[Filed, December 10, 1970]

ORDER

It is ORDERED by the Court, *sua sponte,* that the opinion of this Court filed herein on November 3, 1970, be amended as follows:

On page 6, in the first full paragraph, lines 6, 7, and 8, change the sentence beginning "On that same date . . . ." to read:

> On that same date there was in the Special Escrow Account for this project, dated 16 March 1960, the sum of $144,007.95, which was reduced by the time the suit was filed and at the time summary judgment was granted, to $72,317.00.

On page 6, in the first full paragraph, line 14, delete the words "totalling $97,728.44," and insert therefor "outstanding and".

Per Curiam

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS (Filed December 7, 1970)

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam

For the Court:

NATHAN J. PAULSON
Clerk

APPENDIX C

EXCERPT FROM DISTRICT COURT HEARING ON 28 FEBRUARY 1969

The above-entitled cause came on for hearing, pursuant to notice, before the HONORABLE OLIVER GASCH, United States District Judge, at 10:15 a.m.

APPEARANCES:

FOR THE PLAINTIFFS:
Kahl K. Spriggs, Esq.

FOR THE DEFENDANTS:

Daniel J. Anderson, Esq.

* * * * *

[35] THE COURT: Mr. Spriggs, is there anything else?

MR. SPRIGGS: No, Your Honor.

THE COURT: Gentlemen, I have read your extensive pleadings, and I think the movant is entitled to summary judgment.

You may submit an order.

(Whereupon, at 10:33 a.m., the above-entitled cause was continued sine die.)

CERTIFICATE OF OFFICIAL REPORTER

This record is certified by the undersigned reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

/s/ DUANE B. DUSCHAINE
Official Reporter

APPENDIX D

ORDER FOR SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANTS MATHER CONSTRUCTION COMPANY, D & L CONSTRUCTION COMPANY AND J. D. BRADLEY, INC.

Upon consideration of the motion of plaintiffs for summary judgment against defendants Mather Construction Company, D & L Construction Company and J. D. Bradley, Inc., and after oral argument thereon, it is by the Court this 15th day of March, 1969,

ORDERED, that such motion be, and it is hereby, granted; and it is further

ORDERED and ADJUDGED:

1. That such defendants indemnify and reimburse plaintiffs, Continental Casualty Company and The Fidelity and Casualty Company of New York, out of the mortgage proceeds or funds escrowed by them at the final closing of mortgage areas Mather AFB Housing No. Two, Inc. (Capehart FHA Project No. 136-81007, Air 7) and Mather AFB Housing No. Three, Inc. (Capehart FHA Project No. 136-81008, Air 8), pertaining to Housing Contract No. AF-04 (612)-1032 dated September 4, 1958, among defendants D & L Construction Company and J. D. Bradley, Inc. (a joint venture), eligible builder; Mather AFB Housing, Inc., Mather AFB Housing No. Two, Inc. and Mather AFB Housing No Three, Inc., mortgagor builders, and the United States (through the Department of the Air Force) for construction of 220 units of military housing at Mather Air Force Base, California;

2. That, as against defendants Mather Construction Company, D & L Construction Company and J. D. Bradley, Inc., plaintiffs are entitled to the sums so

escrowed with defendant American Security Corporation– namely, the amounts of $97,728.44, $28,498.00 and $21,598.00, or a total of $147,824.44, together with any lawful interest which may be payable thereon.

/s/ OLIVER GASCH
Judge

[Subscription Omitted in Printing]

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APPENDIX E

ORDER OF THE DISTRICT COURT OF 17 MARCH 1969

Upon consideration of the motion by the defendants for the Court to reconsider its granting of the motion for summary judgment by the plaintiffs, the matter having been submitted and opposed by memoranda from both parties and it appearing to the Court that no new circumstances have been shown which should alter the Court's original decision, it is by the Court this 17th day of March, 1969,

ORDERED that the motion by the defendants to reconsider be and the same hereby is denied.

/s/ OLIVER GASCH
Judge

* * * * *

APPENDIX F

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

RULES OF CIVIL PROCEDURE

* * * * *

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion

that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

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UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX G

AFFIDAVIT OF CARL J. FELTH IN SUPPORT OF DEFENDANTS' MATHER CONSTRUCTION COMPANY, D & L CONSTRUCTION COMPANY, AND J. D. BRADLEY, INC., MOTION FOR RECONSIDERATION OF ORDER

District of)
) ss
Columbia)

Carl J. Felth, being first duly sworn, deposes and says that he is one of the attorneys of record in the above captioned litigation, and that he was personally acquainted with the late William E. Fitzpatrick, the personal representative and attorney-in-fact for these defendants at the closing of the Capehart projects covering construction of military family housing at Mather Air Force Base, California, and that he knows of his personal knowledge that conversations with him as counsel in subject litigation, that monies claimed to have been paid by plaintiffs in this case included payments for labor and materials other than that specifically identified in the Escrow Deposit Agreement, dated March 16, 1960, and that he verily believes that additional evidence of such fact can be procured with additional time and the opportunity to travel to witnesses believed to have such information.

Further affiant sayeth not.

/s/ CARL J. FELTH

Subscribed and sworn to before me in the City of Washington, District of Columbia on this the 4th day of March 1969.

ROBERT A. SIMMONS, Clerk

/s/ HELEN BENDURE
Deputy Clerk

APPENDIX H

AFFIDAVIT OF D. L. BRADLEY IN SUPPORT OF MOTION BY DEFENDANTS MATHER CONSTRUCTION COMPANY, D & L CONSTRUCTION COMPANY, AND J. D. BRADLEY, INC., FOR RECONSIDERATION OF ORDER FOR SUMMARY JUDGMENT FOR PLAINTIFFS

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

D. L. Bradley, being first duly sworn, deposes and states that he is the President of D & L Construction Company, who, together with J. D. Bradley, Inc., were the joint venturers and eligible builder identified in the Escrow Agreement, dated March 16, 1960, Re: Mather AFB Housing No. Three, Inc., FHA Project No. 136-81008-Air-8, with its principal place of business at 13238 Sherman Way, North Hollywood, California;

That this affidavit is made in support of defendants Mather Construction Company, D & L Construction Company, and J. D. Bradley, Inc.'s Motion For Reconsideration Of Plaintiffs' Motion For Summary Judgment in the above-captioned action;

That he knows of his own personal knowledge, as the eligible builder for the project identified, that defendants D & L Construction Company and J. D. Bradley, Inc., made deposits and contributions into the working capital fund established to finance construction of such project which deposits and contributions totalled approximately $200,000.00;

That as a requirement for the issuance of the bonds referred to in plaintiffs' complaint, plaintiffs required

that such working capital fund be put in the control of others than D & L Construction Company and J. D. Bradley, Inc., to wit one Hal B. Hayes and his agents;

That the said Hal B. Hayes was engaged in the construction of a 67 unit Bachelor Officers' Quarters housing project at Mather Air Force Base, similar in all respects to the Capehart housing construction, which was being built at approximately the same time and which project was being administered from the same field construction office at Mather Air Force Base as was the Capehart Housing project;

That the said Hal B. Hayes was also engaged in the construction of similar Capehart Housing projects at nearby Beale Air Force Base, California, north of the city of Sacramento, as well as elsewhere, which projects were bonded by plaintiffs, and that in many instances the same subcontractors and materialmen who participated in the Mather Project, participated in the construction of such other projects;

That Mather AFB Housing No. Two, Inc., FHA Project No. 136-81007-Air-7, was completed and turned over to the Air Force for their use and occupancy, except for some minor exterior work, principally landscaping, on or before 1 February 1960;

That Mather AFB Housing No. Three, Inc., FHA Project No. 136-81008-Air-8, was completed and turned over to the Air Force for their use and occupancy, except for exterior work, principally landscaping, on or before 16 March 1960;

That in both of these incomplete work escrow agreements, the eligible builder was required to escrow 200% of the estimated cost of completion as determined by the Air Force Contracting Officer;

That the escrows required to be established by the Government, i.e., the Federal Housing Administration and the Air Force, were for the express purposes set forth in the agreements.

/s/ D.L. BRADLEY

Subscribed and sworn to before me this 13th day of March, 1969.

/s/ FRANK W. PINE
Notary Public in and for the State and County aforesaid

My Commission expires: Dec. _____ (SEAL)

APPENDIX I

AFFIDAVIT OF JAMES E. POSTULA IN SUPPORT OF MOTION BY PLAINTIFFS FOR SUMMARY JUDGMENT AGAINST DEFENDANTS MATHER CONSTRUCTION COMPANY, D & L CONSTRUCTION COMPANY AND J. D. BRADLEY, INC.

STATE OF ILLIONIS)
) ss:
COUNTY OF COOK)

James E. Postula, being first duly sworn, deposes and says that he is Assistant Vice President of plaintiff Continental Casualty Company, a corporation organized and existing under the law of the State of Illinois, with its principal place of business at 310 South Michigan Avenue, Chicago, Illinois;

That this affidavit is made in support of motion by the plaintiffs for summary judgment against defendants Mather Construction Company, D & L Construction Company and J. D. Bradley, Inc. in the above-entitled cause;

That the facts set forth herein are known personally to affiant and are reflected from office records of Continental Casualty Company to which affiant has access in the course of his official duties;

That the plaintiffs' statement of material facts as to which there is no genuine issue, which affiant has read, is true; that all claims against plaintiffs, as sureties for defendants and indemnitors D & L Construction Company, J. D. Bradley, Inc. and Mather Construction Company, by persons performing work as subcontractors or as suppliers furnishing materials in the prosecution of the work of the construction of the Mather AFB 220

project referred to in plaintiffs' statement of material facts as to which there is no genuine issue, were paid in good faith after investigation and in the belief that plaintiffs were liable therefor, copies of the drafts for such payments being annexed thereto as Exhibit H (1 through 18).

/s/ JAMES E. POSTULA

Subscribed and sworn to before me this 11th day of February, 1969.

/s/ L. SORENSEN
Notary Public in and for
the State and County
aforesaid

My Commission Expires Oct. 22, 1972.